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## The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves And the War on Indecency With Its President, Tim Winter

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# **The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves And the War on Indecency With Its President, Tim Winter**

*by*  
CLAY CALVERT\* AND ROBERT D. RICHARDS†

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## **I. Introduction**

Federal law provides that “whoever utters any obscene,<sup>1</sup> indecent,<sup>2</sup> or profane<sup>3</sup> language by means of radio communication

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1. Obscenity falls outside the First Amendment’s protection of free speech. *See* *Roth v. United States*, 354 U.S. 476, 485 (1957) (writing that “obscenity is not within the area of constitutionally protected speech or press.”). Although the U.S. Supreme Court held in *Stanley v. Georgia*, 394 U.S. 557 (1969), that there is a right to possess obscene material in the privacy of one’s own home, there is no “correlative right to receive it,

shall be fined under this title or imprisoned not more than two years, or both.”<sup>4</sup> The Federal Communications Commission (“FCC”) is the administrative agency tasked with enforcing this statute.<sup>5</sup> It has the support of the nation’s high court to fulfill this mission, as the Supreme Court in 1978 upheld, against a First Amendment<sup>6</sup> free-speech challenge, the FCC’s ability to punish broadcasters for airing non-obscene, yet indecent, content during times of the day<sup>7</sup> when children are likely to be in the audience.<sup>8</sup>

transport it, or distribute it.” *United States v. Orito*, 413 U.S. 139, 141 (1973). In *Miller v. California*, 413 U.S. 15, 24 (1973), the Court held that when determining whether material is obscene, jurors and judges must consider:

a) whether “the average person, applying contemporary community standards,” would find that the work, taken as a whole, appeals to a prurient interest; b) whether [it] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and c) whether, taken as a whole, it lacks serious literary, artistic, political or scientific value.

*Id.* (citations omitted).

2. The FCC defines indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” *FCC Consumer Facts: Obscene, Indecent, and Profane Broadcasts*, FED. COMM’N COMM’N (Oct. 8, 2008), <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Mar. 7, 2011).

3. The FCC defines profanity as “language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” *Id.*

4. 18 U.S.C. § 1464 (2010).

5. As the FCC states on its website:

It is a violation of federal law to air obscene programming at any time. It is also a violation of federal law to broadcast indecent or profane programming during certain hours . . . . *Congress has given the Federal Communications Commission (FCC) the responsibility for administratively enforcing the law that governs these types of broadcasts.* The FCC has authority to issue civil monetary penalties, revoke a license or deny a renewal application. In addition, violators of the law, if convicted in a federal district court, are subject to criminal fines and/or imprisonment for not more than two years.

*Regulation of Obscenity, Indecency and Profanity*, FED. COMM’N COMM’N, <http://www.fcc.gov/eb/oip/Welcome.html> (last visited Mar. 7, 2011) (emphasis added).

6. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

7. The FCC today provides a safe-harbor zone for indecent content. In particular, this is “the time period between 10 p.m. and 6 a.m., local time. During this time period, a station may air indecent and/or profane material. In contrast, there is no ‘safe harbor’ for

Holding the FCC's metaphorical feet to the fire to enforce the law is the Parents Television Council ("PTC"), recently dubbed by *Daily Variety* as a "conservative media watchdog group"<sup>9</sup> and blasted by Jim Dyke, executive director of TV Watch,<sup>10</sup> as a "well-organized vocal minority"<sup>11</sup> that "want[s] the government to enforce what they believe is quality television."<sup>12</sup> The PTC believes, "[p]arents ought to make that decision."<sup>13</sup> Love it or hate it, however, the PTC has garnered a very high media profile in recent years. *Broadcasting & Cable* magazine observed that it has "gotten most of the indecency-complaint press in the last few years, thanks to its full-court blitz on the Janet Jackson incident."<sup>14</sup> The latter, of course, is a reference to the 2004 Super Bowl halftime show, carried live on CBS-affiliated stations nationwide, in which Jackson's breast was briefly exposed, drawing the wrath of the FCC to the tune of a then-unprecedented \$550,000 forfeiture.<sup>15</sup> In 2007, *Variety* labeled the PTC as:

somewhat of a thorn in the side of the television networks, and as much as executives have tried not to give them too much credit, the PTC can claim some high-profile recent successes. The organization was out front in filing complaints against CBS for Janet Jackson's Nipplegate in 2004 and for

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the broadcast of obscene material. Obscene material is entitled to no First Amendment protection, and may not be broadcast at any time." *Obscenity, Indecency, & Profanity—Frequently Asked Questions*, FED. COMM'C'N COMM'N, <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw> (last visited Nov. 9, 2010).

8. FCC v. Pacifica Found., 438 U.S. 726 (1978).

9. Ted Johnson, *Bleeping War Back in Court*, DAILY VARIETY, Jan. 14, 2010, at 1.

10. This organization "is dedicated to using all communications available to educate parents about the existing tools to manage their children's television consumption; and to give voice to the majority of Americans who believe responsibility—not more regulation—is the solution." *Mission Statement*, TV WATCH, <http://www.televisionwatch.org/WhoWeAre/Mission.html> (last visited Mar. 7, 2011). TV Watch, launched in May 2005, "is a nonpartisan coalition of 27 individuals and organizations including legal and entertainment experts and political and consumer organizations representing more than four million Americans." Press Release, TV Watch, TV Watch Launches "Parents Say kNOW" Campaign (May 6, 2010), *available at* <http://www.televisionwatch.org/NewsPolls/PressReleases/PR044.html>.

11. David Ho, *Guardians of Decency*, AUSTIN AM.-STATESMAN, July 20, 2006, at H1.

12. *Id.*

13. *Id.*

14. John Eggerton, *FCC Still Has Eyes for Janet*, BROAD. & CABLE, Sept. 21, 2009, at 3.

15. See In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 6653 (May 31, 2006), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-68A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-68A1.pdf).

Bono's "fucking brilliant"<sup>16</sup> comment at the Grammys a year earlier.<sup>17</sup>

The PTC's website facilitates the lodging of indecency complaints with the FCC by providing instructions and a template form for filing them directly online.<sup>18</sup> This system has been criticized by some commentators. For instance, Eric Mink of the *St. Louis Post-Dispatch* wrote that "so slickly constructed is its Web complaint page that a person can file multiple FCC complaints with mere mouse clicks, without ever having seen the show in question."<sup>19</sup> Mink derisively wrote that this allows "multiple complaints [to be] whipped up by the PTC."<sup>20</sup> So effective is the PTC's system that trade publication *Mediaweek* in December 2004 reported that "the FCC estimates that almost 100 percent of all the indecency complaints it received in 2003 and 2004, excluding Super Bowl kerfuffle, came from the PTC."<sup>21</sup> As the *Philadelphia Inquirer* described, FCC "statistics show that radio and broadcast and cable TV complaints have escalated astronomically, from 111 in 2000 to 1,068,802 in 2004. With the exception of the half-million Super Bowl protests, 99.9 percent of them have come from the Parents Television Council."<sup>22</sup>

In addition to filing complaints, the PTC, as the *Washington Post* reported, "strenuously lobbied the commission to adopt [a] tougher stance"<sup>23</sup> on broadcasters when they air so-called fleeting expletives—a stance the FCC adopted and the Supreme Court ultimately upheld in 2009 in *FCC v. Fox Television Stations, Inc.*<sup>24</sup>

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16. See In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975 (Mar. 18, 2004), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-43A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-04-43A1.pdf).

17. Michael Learmonth, *A New Era Dawns for Industry Gadfly*, VARIETY, Mar. 19, 2007, at 13.

18. See *File an Official Indecency Complaint with the Fed. Comm'n Comm'n (FCC) Now*, PARENTS TELEVISION COUNCIL, <https://www.parentstv.org/PTC/fcc/fcccomplaint.asp> (last visited Mar. 7, 2011).

19. Eric Mink, *Finally, the Networks are Mad as (Heck)*, ST. LOUIS POST-DISPATCH, Aug. 2, 2006, at B9.

20. *Id.*

21. Melanie McFarland, *10 Moments to Remember from 2004*, SEATTLE POST-INTELLIGENCER, Dec. 30, 2004, at C1.

22. Jonathan Storm, *Turning up the Volume Over TV Indecency*, PHILA. INQUIRER, Jan. 16, 2005, at H1.

23. Robert Barnes, *High Court Backs FCC Crackdown on On-Air Expletives*, WASH. POST, Apr. 29, 2009, at A3.

24. 129 S. Ct. 1800 (2009).

So just what is the Los Angeles-based PTC and what exactly does it do? In a 2008 commentary in *Television Week*, its president, Tim Winter, tried to succinctly answer these questions:

The PTC is a 1.3 million-member nonpartisan education organization advocating responsible entertainment. The organization produces critical research that is provided free of charge to parents so that they can make informed entertainment choices for their own families. The majority of our work and financial resources goes toward educating parents.<sup>25</sup>

One example of that “critical research”<sup>26</sup> is a 2008 report prepared by the PTC that found that “America’s prime-time television broadcasters favor adultery and nonmarital sex over traditional family values.”<sup>27</sup> Entitled “Happily Never After,” the report concluded that:

Sex in the context of marriage is either non-existent on prime-time broadcast television, or is depicted as a burdensome rather than as an expression of love and commitment. By contrast, extra-marital or adulterous sexual relationships are depicted with greater frequency and overwhelmingly, as a positive experience. Across the broadcast networks, verbal references to non-marital sex outnumbered references to sex in the context of marriage by nearly 3 to 1; and scenes depicting or implying sex between non-married partners outnumbered scenes depicting or implying sex between married partners by a ratio of nearly 4 to 1.<sup>28</sup>

Despite its touted successes, the PTC suffered a major setback in July 2010 in its efforts to clean up the nation’s airwaves. In *Fox Television Stations, Inc. v. FCC*, the Court of Appeals for the Second Circuit declared the FCC’s indecency policy, including its efforts targeting fleeting expletives, “unconstitutionally vague, creating a

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25. Tim Winter, *Parents Want Industry to Act Responsibly*, TELEVISION WK., Oct. 27, 2008, at 10.

26. *Id.*

27. Kara Rowland, *Study Finds Nonmarital Sex a Prime-Time Staple*, WASH. TIMES, Aug. 6, 2008, at A11.

28. *Happily Never After: How Hollywood Favors Adultery and Promiscuity on Prime Time Broadcast Television*, PARENTS TELEVISION COUNCIL, 1 (Aug. 5, 2008), available at <https://www.parentstv.org/ptc/publications/reports/sexontv/marriagestudy.pdf>.

chilling effect that goes far beyond the fleeting expletives at issue here.”<sup>29</sup> The unanimous three-judge panel wrote that under the FCC’s indecency policy, “broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose. Indeed, there is ample evidence in the record that the FCC’s indecency policy has chilled protected speech.”<sup>30</sup> For instance, the appellate court noted that “an episode of ‘House’ was re-written after concerns that one of the character’s struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.”<sup>31</sup>

In applying the vagueness doctrine, the Second Circuit observed that:

broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny. It is the language of the rule, not the medium in which it is applied, that determines whether a law or regulation is impermissibly vague.<sup>32</sup>

Illustrating the vagueness problem, the appellate court wrote that “the first problem arises in the FCC’s determination as to which words or expressions are patently offensive. For instance, while the FCC concluded that ‘bullshit’ in a ‘NYPD Blue’ episode was patently offensive, it concluded that ‘dick’ and ‘dickhead’ were not.”<sup>33</sup> The appellate court also observed that the FCC had already determined that other expletives, such as “pissed off” and “kiss my ass,” were *not* patently offensive.<sup>34</sup>

The Second Circuit also noted that,

[s]ex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all “patently offensive” references to sex, sexual organs, and excretion, without giving adequate guidance as to what

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29. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010).

30. *Id.* at 334.

31. *Id.* at 335.

32. *Id.* at 329.

33. *Id.* at 330.

34. *Id.*

“patently offensive” means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster’s peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.<sup>35</sup>

Intimating at the near impossibility of the FCC ever clearly and cleanly enforcing a rule targeting broadcast indecency, the Second Circuit reasoned that “the English language is rife with creative ways of depicting sexual or excretory organs or activities, and even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day.”<sup>36</sup> Perhaps throwing the FCC a bone in defeat, the appellate court concluded that “we do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC’s current policy fails constitutional scrutiny.”<sup>37</sup> In other words, the FCC needs to go back to the administrative drawing board and try again.

In response, Tim Winter issued a statement calling the Second Circuit’s ruling “nothing less than a slap in the face” of “parents and families around the country,” and he urged FCC Chairman Julius Genachowski and the Obama administration to “immediately appeal” the decision.<sup>38</sup> He received backup from at least one government official. Following the ruling, FCC Commissioner Michael Copps issued a statement that blasted the opinion as “an anti-family decision” in which the Second Circuit “focused its energies on the purported chilling effect our indecency policy has on broadcasters of indecent programming, and no time focusing on the chilling effect today’s decision will have on the ability of American parents to safeguard the interests of their children.”<sup>39</sup>

This article takes an in-depth, first-person examination of the PTC. In particular, it pivots on an exclusive interview conducted by

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35. *Id.* at 335.

36. *Id.* at 330.

37. *Id.* at 335.

38. Press Release, Parents Television Council, PTC Attacks Court Ruling Allowing Unedited Profanity to Air at Any Time of Day (July 13, 2010), *available at* <http://www.parentstv.org/PTC/news/release/2010/0713.asp>.

39. Press Release, FCC News, Statement of Comm’r Michael J. Copps on the Second Circuit Court of Appeals Decision in *Fox v. FCC* (July 13, 2010), *available at* [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0713/DOC-299761A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0713/DOC-299761A1.pdf).



the authors with PTC President Tim Winter in June 2010.<sup>40</sup> The interview took place at the organization's headquarters in downtown Los Angeles, located on the twentieth floor of the sixty-two story Aon Center at 707 Wilshire Boulevard, overlooking the roof-top pool of a trendy nearby hotel, The Standard.<sup>41</sup>

The article is divided into three parts. Part I describes the methodology and procedures for conducting the interview and drafting the article. Part II is divided into four sections based upon subject matter, setting forth in question-and-answer fashion the interview conducted by the authors with Tim Winter. Each section begins with a brief overview drafted by the authors to introduce the subject matter or theme in that section. Within Winter's actual remarks, the authors have added more than one-dozen footnotes where, in their collective opinion, further information might prove helpful to readers of this article. Finally, Part III provides the authors' analysis and critique of Winter's remarks.

## II. Methodology and Procedures

The interview took place in a glass-walled conference room in the PTC's suite, starting at approximately 10:15 a.m. on Saturday, June 5, 2010, and lasting until 12:45 p.m. The interview was recorded with Marantz, broadcast-quality recording equipment on two audiotapes using a tabletop microphone. The tapes were transcribed that same month by one of the authors in State College, Pennsylvania. Both authors then reviewed and proofread the transcript for accuracy and any typographical errors in the transcription process.

Next, the authors made a few very minor changes for syntax in some places, but did not alter the substantive content or material meaning of any of Tim Winter's responses. Some responses were reordered and reorganized to reflect the quartet of themes of this article set forth in Part II, while other portions of the interview were omitted as extraneous, redundant, or beyond the scope of the purpose of this article. The authors retain exclusive possession of the original audio recording of their interview with Tim Winter, as well as the printed transcript of the interview.

For purposes of full disclosure and the preservation of objectivity, it should be noted that the authors are not—and never have been—

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40. Interview with Tim Winter, President, Parents Television Council, in L.A., Cal. (June 5, 2010) [hereinafter Interview].

41. THE STANDARD, <http://www.standardhotels.com/los-angeles> (last visited Mar. 7, 2011).

members of the PTC. The authors, in fact, had only met Tim Winter on two occasions prior to the interview, and they do not have any other connection with either him or the PTC.

The interview was arranged via e-mail and telephone correspondence. Importantly, Winter did *not* have an advance opportunity to review or preview any of the questions he was asked, thus allowing for greater spontaneity and immediacy of responses. Prior to the questions being posed, Winter was informed only that the authors wanted to interview him about the work of the PTC, his own role with the organization, and the FCC's regulation of indecency. Similarly, Winter did not read or review any drafts of this law journal article before it was published. Winter was, however, given an opportunity to review the raw transcript of the interview to verify its accuracy.

Subsequent to the authors' interview with him, and in an effort to make this article as timely and as up to date as possible, Tim Winter e-mailed further comments on the Second Circuit's ruling in *Fox Television Stations*,<sup>42</sup> which was decided after the interview.<sup>43</sup> Those e-mailed comments are set forth, in verbatim fashion, in the Part III.

With this in mind, the article now turns to the interview with Winter.

### III. The Interview

In Section A below, Tim Winter initially describes his many years of work in the entertainment industry prior to joining the PTC. He relates a personal story that reveals and conveys the very compelling reason why he, as the father of a young daughter, suddenly decided that something needed to be done about indecent television content. Section B then provides Winter's description of the work of the PTC, its mission, its staffing, its budget, and his role within the organization. Of particular interest here are the PTC's efforts targeting supposedly family-friendly advertisers that nonetheless run commercials on shows with adult-themed content.

Section C focuses on the FCC, its regulation of indecent content and the PTC's efforts to make the FCC ramp up its enforcement of

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42. 613 F.3d 317, 319 (2d Cir. 2010).

43. See *infra* notes 118–19 and accompanying text.

the federal law<sup>44</sup> described in the Introduction that allows the Commission to fine broadcasters for obscene, indecent and profane language. This section also includes Winter's opinion on the FCC's controversial regulation of so-called fleeting expletives. Finally, in Section D Winter details his views on the regulation of violent content—a category not currently controlled by the FCC but one about which, it becomes clear, both he and the PTC are greatly concerned.

#### **A. From Network Insider to Father to the Head of the PTC**

This section reveals that Tim Winter was no stranger to the entertainment industry before coming to work at the PTC. In fact, he was part of it—part of the very same industry that the PTC so often criticizes and against which he so often rails.<sup>45</sup> Perhaps, however, this background provides Winter with a unique perspective and the ability to see all sides of the issues, especially considering that he understands the First Amendment issues from his law school training as discussed below. Indeed, Winter is quick to laud broadcasters when, in his eyes, they perform well. For instance, in June 2010, he issued a press release lauding to officials at ABC for bleeping expletives during the NBA finals between the Los Angeles Lakers and Boston Celtics.<sup>46</sup> He even went so far as “to invite the person or

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44. 18 U.S.C. § 1464 (2010).

45. In one such sound bite-esque lambasting of the broadcast industry, Winter stated:

The family hour was once a time to watch things like “Mutual of Omaha’s Wild Kingdom” or “Leave It to Beaver.” Now it’s been turned into a toxic dump by an industry which does not serve the interests of the American public. The people are supposed to own these airwaves, not the industry.

Jennifer Harper, *Family Hour Goes Down the Tubes*, WASH. TIMES, Sept. 6, 2007, at A10.

46. As Winter wittily put it:

The most exhausted person after last night’s Game Seven of the NBA finals probably wasn’t a member of the Lakers or Celtics—it was the person who had control over the bleep button. We are grateful for ABC’s commitment to airing a championship broadcast that children and families could enjoy without being assaulted by inappropriate and profane language.

Press Release, Parents Television Council, PTC Commends ABC for Bleeping Expletives During NBA Finals (June 18, 2010), available at <http://www.parentstv.org/PTC/news/release/2010/0618.asp>.

people who worked that bleep button during the NBA finals to lunch here in downtown Los Angeles, my treat.”<sup>47</sup>

Winter initially served as the executive director of the PTC and took over the title of president on January 1, 2007, several months after the organization’s founder, L. Brent Bozell, announced he would be stepping down from that perch.<sup>48</sup> Today, Bozell is president of the Virginia-based Media Research Center (“MRC”), which bills itself as “America’s Media Watchdog”<sup>49</sup> and that, rather than solely targeting indecency, ferrets out and attacks liberal bias in the news media.<sup>50</sup>

With this in mind, the article now turns to the remarks of Tim Winter during the authors’ interview with him.

QUESTION: What did you do prior to coming to the Parents Television Council?

WINTER: I started my career in 1982 when I moved to Los Angeles and found work at NBC. I was a financial analyst and spent fifteen years with NBC, all in finance. While working there, I went to Loyola Law School at night for four years. I was one of those students who proudly made the top half of the class possible, but I also was working fifty hours per week, was student body president, had season tickets to the Kings’ hockey games, and had a girlfriend. My priorities were to graduate and to pass the bar. I did both.

QUESTION: Did you ever practice law?

WINTER: No. One of my great jobs at NBC was working as a production auditor. I had to go out to enforce the financial terms of contracts with program producers. For instance, with the television show *Miami Vice*, which was produced by Universal Studios, the producers would come back to Universal and say they wanted to do a really cool boat explosion scene. Universal would say it didn’t have the money, so the producers would go to NBC and ask for it.

They would say, “Give us another \$200,000 for the boat explosion.” NBC would respond, “OK, but we’re going to audit to

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47. *Id.*

48. *Parents Television Council President Steps Down*, DESERET MORNING NEWS (Salt Lake City), Sept. 3, 2006.

49. *About the MRC*, MEDIA RESEARCH CENTER, <http://www.mrc.org/about/about.aspx> (last visited Mar. 7, 2011).

50. *See id.* (asserting that “the MRC’s successful implementation of the largest, most comprehensive media monitoring operation in the world, the MRC serves as the checks and balances on the Fourth Estate,” and adding that “the Media Research Center has become an institutionalized machine on the issue of balance in the press.”).

make sure you actually spent the \$200,000 on the boat explosion and not on your after-party.” So I would go out to audit the production elements for which NBC was paying. It was very cool and I met some really interesting people, including Michael Landon on *Highway to Heaven*. It was a great job because I got to see how finance, law, and production all came together. In fact, when I read the contracts that we had to enforce, I decided that I would go to law school to write better ones. But I never got that job, as NBC had other ideas. I spent twelve years in Burbank, one in London, and two in New York.

After I passed the bar, I received a call from the corporate folks at NBC. They wanted me to go to London to help manage their new cable network—a pan-European cable network called NBC Super Channel, but that was a misnomer. It was supposed to be one channel that spread culturally across Europe, but they just couldn’t do it right in any country. The only people who watched were American ex-pats living over there.

From London, I went to New York to work for NBC’s cable division. We also started, at the time, something called NBC Interactive Media, which was the network’s first online presence. I was the first bean counter for that division. I was on the team that put together MSNBC—code name “Project Ohio”—in which the network wanted to compete against CNN, but not really have to pay for it, so it teamed up with Microsoft.

After that, I spent a couple of years at MGM Studios in video game publishing and online work. Then, I did a couple of dotcoms involving streaming media applications and technologies to help cable and broadcasters reach audiences on their computers when they were away from a television. The models that we were developing are now standard practice today. We did it ten years ago.

QUESTION: Do you think that your law background at Loyola—constitutional law and First Amendment—affects your position here in terms of having an understanding of the free speech issues that come into play?

WINTER: Absolutely.

QUESTION: How did you transition from your work in and for broadcasting to the Parents Television Council?

WINTER: After working fourteen-hour days, twenty-seven days a month for the dotcoms, I came home one day to my wife and proposed a deal. I wanted to take a year off. We both had decent salaries, but we weren’t wealthy or rich. We figured out, however, how to do it financially. Our daughter Erika was four years old then, and I said to my wife, “I’ll get Erika to school, do the laundry, and

clean the house. I'll get her home, fed, into her pajamas and, when you walk in the door, I'll have a glass of merlot waiting for you."

I was a full-time dad, and that's when I had an epiphany for joining the Parents Television Council. I was home cooking dinner around five o'clock in the afternoon one day. It's a small house, with the kitchen adjacent to the living room. The TV was on and I heard something that caught my attention. I went into the living room, and it was a reality dating show called *Fifth Wheel*.<sup>51</sup> It had two young guys and two young girls—very attractive, with raging hormones. The show was basically a competition to see who was going to sleep with whom. To make it more competitive, they added one more guy or girl—the fifth wheel. In order to get the guy she wanted, the fifth wheel took off her shirt, put whipped cream on her breasts and let the boy lick it off. It was pixilated, but you could see and hear what was going on. This was local broadcast television, not cable, at five in the afternoon! I was blown away.

I had a "V-8 moment," where you slap yourself in the forehead. The show's message to girls is, "If you want boys to like you, this is how you should behave." The message to boys is, "This is how girls should treat you." I was really upset.

This was around the same time when Elizabeth Smart was reunited with her family after being kidnapped from her home in Salt Lake City.<sup>52</sup> A local station got a description of the suspect and broadcast it. Literally, within minutes, someone identified the guy, he was arrested and this little girl was reunited with her family. I thought that, in the past day or two, I had seen both the very best and very worst of what broadcast TV can do.

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51. As described on Film.com, this show was a "reality/romance series in which two men and two women go out on a double date. As the evening progresses, a fifth attractive person is thrown into the mix. The latter tries to break up one or both couples." *The Fifth Wheel*, FILM.COM, <http://www.film.com/tv/the-fifth-wheel/14878042> (last visited Mar. 7, 2011).

52. This is a reference to the kidnapping and rape of a Utah girl in 2002, who allegedly was held captive for nine months by Brian David Mitchell and Wanda Barzee, the former of whom was still undergoing mental competency proceedings in his 2010 federal criminal prosecution and the latter of whom was sentenced in May 2010 to fifteen years in federal prison. See Memorandum Decision & Order Determining Competency, *United States v. Mitchell*, No. 2:08CR125DAK (D. Utah Mar. 1, 2010), available at <http://www.justice.gov/usao/ut/press/indictments/Memo%20and%20Dec%20030110.pdf>; Press Release, U.S. Dep't of Justice, Wanda Barzee is Sentenced to 15 Years in Federal Prison for Her Role in Kidnapping of Elizabeth Smart (May 21, 2010), available at <http://www.justice.gov/usao/ut/press/releases/Barzee%20sentencing.pdf> (describing the sentencing of Barzee).

If you had told me twenty years ago I would be in this job, I would have laughed my head off and called you crazy. I was a guy who didn't care about standards. I thought anyone who did care about them was a whiner, an out-of-touch loon.

QUESTION: Given that posture, how did you end up here?

WINTER: Even though I was a full-time homemaker when this occurred, I kept an eye on the radar screen for jobs that fit my profile. One popped up, and it was for executive director of the PTC. I read the job description and thought, "This is me."

I went to the PTC website and was immediately turned off. Brent Bozell was the founder, and I had never heard of him. I looked at his bio and started thinking, "Here's a guy with whom I've never ever checked the same box on a ballot." But I saw the description of the organization and what it was trying to do. I thought, "Well, I agree with what they are saying, but it seems awkward."

At the interview with Brent, the first words out of my mouth were, "If there's a political litmus test for this job, I'm going to fail." He laughed and said, "This is not a partisan group." He said his other group in D.C.—the Media Research Center<sup>53</sup>—is conservative, but the PTC is not. He added that Steve Allen<sup>54</sup> was a co-founder here at the PTC. Steve was very liberal and agnostic—not a guy of faith—and he was a Hollywood icon. He was the opposite of Bozell, yet they worked so closely together on the mission.

We had a great conversation, he hired me, and I have been here for more than seven years now—four as executive director and the past three as president. I started on April Fool's Day in 2003.

I guess the take-away is that when I was working at my various jobs at NBC and MGM, I never envisioned doing something like this. I just disagreed with what I thought was the premise: You can't watch *that* because you'll go to hell. But when you have a kid, your eyes open up to a lot of different things that you don't otherwise see—everything out there is a potential danger. You don't want to overreact and say, "Now that I have a child, no one else can do anything."

I believe entertainment media are one of the most powerful forces in human history. That's not hyperbole; I really mean it. Granted, it's not a nuclear weapon, but it has more far-reaching effects than a

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53. *About the MRC*, *supra* note 54.

54. See *Steve Allen Profile*, ARCHIVE OF AM. TELEVISION, <http://www.emmytvlegends.org/interviews/people/steve-allen> (last visited Mar. 7, 2011) (including a two-part interview of the legendary television entertainer from 1997).

weapon sometimes does. You can see the good in entertainment, but you also need to be aware of the potential for harm and abuse.

It's a two-fold issue: Either you do or do not believe that entertainment has the power to do harm. I think those who don't believe it have kind of a the-world-is-flat vision. If you believe there is a potential for harm—especially to kids—then the question becomes, “What do you do about it?” Do you simply say it's the parents' responsibility or do you say—if I can borrow from Hillary Clinton—it takes a village?<sup>55</sup> It takes more than just parents. It requires everybody to be mindful of harm, to be responsible jointly, and to weigh in where they can to make things less harmful. But we must do so in such a way that doesn't unreasonably interfere with the other aspects of entertainment. Let's face it, most of this stuff isn't targeted for kids and we must not interfere with what an adult wants to have for an adult.

#### **B. Watching, Reporting, Educating, and Shaming: The Work of the PTC**

*“You have to do it through the politics of shame. Then and only then will the industry get the message.”<sup>56</sup>*

That was the blunt strategy of L. Brent Bozell, Tim Winter's predecessor as president of the PTC. Bozell made this remark back in 1995 when he founded the PTC to further the lobbying efforts of his other organization, the MRC.<sup>57</sup> As *Daily Variety* reported in 1996, the PTC was formed in 1995 as a division of the MRC and that its goals included communicating the importance of family-friendly programming.<sup>58</sup>

In 1997, the PTC garnered its first major national headlines when it issued a report blasting the voluntary, age-based rating system<sup>59</sup>

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55. See Cynthia Spradling, ‘Village’ Concept for Raising Kids Works Beautifully, *TULSA WORLD*, Dec. 8, 1996 (quoting from the former first lady's book for the proposition that “[c]hildren exist in the world as well as in the family. From the moment they are born, they depend on a host of other ‘grown-ups’—grandparents, neighbors, teachers, ministers, employers, political leaders, and untold others who touch their lives directly and indirectly.”).

56. *Producers Not Heeding Criticisms*, *CHARLESTON DAILY MAIL* (W. Va.), Jun. 30, 1995, at 6D (quoting L. Brent Bozell) (emphasis added).

57. See *About the MRC*, *supra* note 54

58. Ted Johnson, *Parent Org Taps Medved*, *DAILY VARIETY*, Mar. 12, 1996, at 17.

59. The voluntary ratings range from TV-Y (suitable for all children) to TV-MA (suitable for mature audiences only). See *The TV Parental Guidelines*, FED. COMM'C'S COMM'N, <http://fcc.gov/vchip/#guidelines> (last visited Mar. 7, 2011) (setting forth the six ratings labels along with their respective descriptions).



used by the major television networks<sup>60</sup> which were submitted to the FCC in a joint effort by the Motion Picture Association of America, the National Cable Television Association, and the National Association of Broadcasters.<sup>61</sup> The study, for instance, drew coverage from the *Austin American-Statesman*,<sup>62</sup> *USA Today*,<sup>63</sup> and the *Dallas Morning News*.<sup>64</sup> That same year, the PTC captured the attention of lawmakers in Washington, D.C., when it drafted an open letter signed by 100 members of the U.S. House and Senate that called upon the major broadcast networks to reinstate a primetime family viewing hour.<sup>65</sup>

Today, Tim Winter has a knack for snappy sound bites that capture media attention and continue to keep the PTC in the public spotlight. Consider the following quips and jabs:

- *"If a striptease during the Super Bowl in front of 90 million people—including millions of children—doesn't fit the parameters of broadcast indecency, then what does?"*<sup>66</sup>
- *There's "a wave of media violence hitting the public like a tsunami."*<sup>67</sup>
- *"This may sound Yogi Berra-ish, but Britney's song [is] a double-entendre with only one meaning. There is no misinterpreting the lyrics to this song."*<sup>68</sup>

60. See, e.g., Jennifer Harper, *TV Ratings System Not Tuned to Values, Parents Group Says*, WASH. TIMES, Feb. 12, 1997, at A5 (describing the results of the study and quoting Brent Bozell, the founder of the PTC, for the proposition that "the age-based ratings system on television today is hopelessly confusing, inconsistent, contradictory and meaningless.").

61. See Letter from Jack Valenti, President and CEO of the Motion Picture Ass'n of Am, Decker Anstrom, President and CEO of the Nat'l Cable Television Ass'n, and Eddie Fritts, President and CEO of the Nat'l Ass'n of Broadcasters, to William F. Caton, Secretary of the Fed. Comm's (Jan. 17, 1997), available at [http://www.fcc.gov/Bureaus/Cable/Public\\_Notices/1997/fc97034a.pdf](http://www.fcc.gov/Bureaus/Cable/Public_Notices/1997/fc97034a.pdf) (setting for the TV Parental Guidelines as originally submitted to the FCC).

62. Bob Dart, *New TV Ratings Receive an F from Watchdog Group*, AUSTIN AM.-STATESMAN, Feb. 12, 1997, at A3.

63. *Watchdogs: Inconsistent System a 'Failure'* USA TODAY, Feb. 10, 1997, at 3D.

64. *Low Ratings for Ratings*, DALLAS MORNING NEWS, Feb. 12, 1997, at 38A.

65. David Hatch, *Lawmakers: Reinstate 'Family Hour': Petition Targets Six Networks*, ELECTRONIC MEDIA, May 12, 1997, at 1.

66. Chris Mondics, *CBS Fine for Faulty Wardrobe is Voided*, PHILA. INQUIRER, Apr. 22, 2008, at E01 (quoting Winter after the U.S. Court of Appeals threw out an FCC fine imposed on CBS stations for airing the 2004 Super Bowl halftime show featuring Janet Jackson).

67. Cristina Kinon, *Putting Women in Harm's Way*, DAILY NEWS (N.Y.), Oct. 29, 2009, at 84 (quoting Tim Winter in lauding the response of Microsoft to pull advertising from a Fox special called "Family Guy Presents: Seth & Alex's Almost Live Comedy Show").

68. *Id.*

While Winter has a way with words, he makes it clear in this section that the PTC's mission is more than about generating news media attention for himself and the organization. Indeed, his remarks reveal the efforts of the PTC that often do not wind up in newspaper stories.

QUESTION: How do you see the responsibility for safeguarding what children see and hear over the air being divvied up among the various groups and stakeholders: parents, government, the PTC, and other likeminded public interest organizations?

WINTER: The responsibility begins and ends with the parents, but there is a lot in between. The parents are the first line of defense, not just with harmful media, but with every aspect of a child's upbringing. There are many instances in that equation, however, where the government inserts itself. We have a seatbelt law and a bicycle helmet law. Some people look at that those laws as unruly intrusions into civil liberties.

The ultimate issue is this: If there really are harms to kids and, in turn, parents are not taking appropriate steps to do something about them, then does the government have a role? It's a tough question.

When it comes to media, we must understand there are different types of entertainment, each with a unique set of guidelines that can or should be adopted. There is a vast chasm of difference between a Larry Flynt<sup>69</sup> magazine like *Hustler* and an 8:00 p.m. CBS broadcast television show. Each form of media invites a time-place-manner potential for restrictions or guidelines that ideally are enforced at the private-sector level.

QUESTION: Do you mean restrictions like the variable obscenity laws<sup>70</sup> that prohibit minors from obtaining publications like *Hustler* magazine?

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68. Jennifer Christman, *Spin Cycle: Britney is Nasty? Say It Ain't So!*, ARK. DEMOCRAT-GAZETTE, Feb. 1, 2009, (quoting Tim Winter on the Britney Spears song entitled "If U Seek Amy").

69. See Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM. LAW CONCEPTS 159 (2001) (observing that "the publisher of pornographic magazines such as *Hustler*, *Barely Legal* and *Chic* has been called everything from 'sleaze merchant' and 'old slimmeister' to 'smut peddler' and 'sultan of smut'").

70. See *Ginsberg v. New York*, 390 U.S. 629, 636 (1968) (finding that, "[b]ecause of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.").

WINTER: Absolutely. We have restrictions on minors entering strip clubs and getting into motion pictures. The Motion Picture Association of America rates movies.<sup>71</sup> You can argue whether or not those ratings are consistent, accurate, or transparent—I say they are not—but there are guidelines and parents tend to have some understanding about what they mean. They go to the movie theater and make a choice about what to see.

That’s a different standard than with television, in which there are subcategories of standards: cable, broadcast, video-on-demand, and even Internet content pumped to a television monitor. Each one carries different standards.

Broadcasting and entertainment are two different things. You can use broadcasting to entertain, but they’re different. Entertainment can be motion pictures, DVDs, comedy clubs, strip clubs, and an infinite number of other entertainment options.

Broadcasting is a different beast. Broadcasters use the public airwaves and they must have a license. In the Communications Act of 1934,<sup>72</sup> the words “public interest” appear something like 117 times. FCC Commissioner Michael Copps<sup>73</sup> says—and I love this quote—that if Congress tells me do something once, I stand at attention, but if it tells me to do something 117 times, I’d better take notice.

What is the public interest?<sup>74</sup> It means 300 million different things to 300 million different Americans. But when you look at content restrictions in broadcasting, it doesn’t mean you can’t say something or you can’t do something. It simply means there are times of day—from 6:00 a.m. to 10:00 p.m.—when you can’t be indecent.

QUESTION: How effective do you think the broadcast television safe-harbor zone for indecent content—from 10:00 p.m. to 6:00 a.m.—is?

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71. *Film Ratings*, MOTION PICTURE ASS’N OF AM, <http://www.mpa.org/ratings> (last visited Nov. 9, 2010) (describing the ratings process and how ratings “provide basic information to parents about the level of various elements in the film, such as sex, violence and language so that parents can decide what their children can and cannot see.”).

72. 47 U.S.C. § 151 *et seq.* (2010).

73. *Biography of FCC Commissioner Michael J. Copps*, FED. COMM’N COMM’N, available at <http://www.fcc.gov/commissioners/copps/biography.html> (last visited Mar. 7, 2011).

74. For a discussion of how the FCC’s Media Bureau defines “public interest,” see THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION (2008) (noting that the requirement for a station to operate in the “public interest, convenience and necessity . . . means that it must air programming that is responsive to the needs and problems of its local community of license.”).

WINTER: It's a reasonable restriction. The government should have a role on certain distribution platforms where someone is sending a signal over the public airwaves into every home in the country. The government is not saying you can't do something, it is simply saying if you are going to air certain content, do it after a certain time.

Clearly, the lines have blurred over the past twenty years with the ubiquitous adoption of cable and satellite. Something like eighty-five percent of Americans have cable or satellite. But those other fifteen percent that choose to get their programming over the air often do so because they don't want to pay for a lot of content they find objectionable.

QUESTION: Do you think that cable television should be subjected to the same restrictions as over-the-air broadcast television because it is so pervasive now?

WINTER: I do not. Cable is a subscription service—an invited guest into people's homes. In contrast, when you turn on over-the-air television, broadcasters are using your property—the airwaves—and with that come valid time-place-manner restrictions.

With cable—and this comes from our Cable Choice campaign—I find it unconscionable, as a consumer, that I am forced to pay for bundles of content that I don't want. I spent a good chunk of my career in the cable industry and know how it works economically. It's a beautiful model—they are getting paid by people who don't want their product, *and* they're getting paid by advertisers. It's an extraordinary business in terms of margin. If you go back to the last two years of earnings reports of the publicly traded media companies, everyone was in the tank, in terms of earnings, except for the cable networks. For instance, NBC was down miserably in its broadcast division, down miserably in its studios, but, by gosh, they had record profits at the cable network operations. How is that possible? Because you cannot unsubscribe from Bravo. That's why.

The industry conjures up great excuses: "It's like the newspaper, you can't unbundle the business section from the sports section . . ." Hogwash. This is not the business section versus the sports section. That's one paper owning all those different sections and deciding how best to use its own real estate. Cable is comprised of different products, owned by different corporations. Do they mean to say that Fox News and MSNBC are just different sections of the same newspaper? The industry has hired some smart folks—some of the best PR minds—to spin this into something that the politicians just

scratch their heads and say, “Gosh, you must be right. Thank you for my campaign check.”

QUESTION: Do you see a time when the FCC would ever compel an *a la carte*<sup>75</sup> cable system?

WINTER: I don’t think the FCC has the authority to do so, although Congress could tell it to adopt such a plan. The Commission can do certain things, but it is interesting to see what authority the FCC really has. It is now getting into the Internet and broadband,<sup>76</sup> but the question is whether it has the authority to do so. Unfortunately, where it does have express authority, like broadcast indecency, it’s not doing its job.

QUESTION: Would an *a la carte* model make the PTC happy?

WINTER: Yes. I have been here seven years, and this is the single most important campaign we have today. We’re now moving into new media distribution platforms, as an organization, and we’re learning our way. The only comfort I have, in terms of how little we know about it is, that I see my friends at the broadcast networks struggling to know what they’re doing. When the billion-dollar companies are not sure what’s going on, then it’s not so bad that the little pip-squeak, non-profits are overwhelmed in terms of new media.

The way the cable industry grew over the past twenty years is the biggest reason why there’s so much indecency on television. My friends in the broadcasting business say, “We have to compete against these cable networks.” As more graphic and edgy content came on HBO, Showtime, and Cinemax, then the expanded-basic cable networks felt they had to compete and become more edgy. Now, the

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75. See generally T. Randolph Beard et al., *A la Carte and “Family Tiers” as a Response to a Market Defect in the Multichannel Video Programming Market*, 15 COMMLAW CONSPECTUS 31 (2006). Beard suggests that:

[w]hile no one forces consumers to watch programming they do not prefer, many have argued that the ready and easy availability of this type of programming to children creates important social problems and costs. Despite these opportunities, the fact remains that a family that wishes to have access to CNN, ESPN, or The Discovery Channel, in the overwhelming majority of cases, must also accept access to MTV and SpikeTV as part of the bundle.

*Id.* at 35.

76. For a discussion of recent broadband proposals, see Jim Carney et al., *Conspectus: Overview of the National Broadband Plan*, 18 COMMLAW CONSPECTUS 517, 517 (2010) (observing that, “[i]n February 2009, Congress gave the Federal Communications Commission . . . a broad mandate to develop a National Broadband Plan (‘Plan’) that would ensure that all Americans have access to broadband service and to set benchmarks to reach that goal.”).

FXs of the world on basic cable have some graphic content. Then, in turn, the over-the-air broadcasters said they had to compete against those guys and be more explicit.

If individual consumers could choose the line-up they wanted and pay just for those networks, two things would happen. First, the broad impact to America's youth would be positive because they would be exposed to less explicit material. Second, the ancillary effect would be that broadcasters wouldn't need to compete, on a head-to-head basis, against graphic programs. It would change the playing field dramatically.

QUESTION: How much of that edgy, graphic content simply reflects what society is today? In other words, it would not be on television if there weren't a market for it.

WINTER: I disagree with the premise of the question. I don't know how much of a market there is for this type of programming. By today's cable standards, if you can get one million viewers, it's a hit, which means that 299 million viewers did not want it. Certainly there's a market for programming with violent or sexual themes, but the product bundle in cable is so lucrative that there is no marketplace pushback on some of those programs.

When NBC was acquiring Universal five or six years ago, it sent in a team to see what assets there were that could be turned into value. It saw this videotape library of all these old shows from the sixties and seventies. The bean counters saw this library of old cop shows and immediately said, "We have a new cable network. It's called 'Sleuth.'"

Trust me, there was no focus group that demonstrated a huge market demand for old *Rockford Files* reruns. What they did was brilliant. They put this network together that costs very little because they own all the content. All they need to do is pay residuals to the actors, writers, and directors. They can force the cable and satellite operators to carry it because if they want to have the Olympics on NBC, watch USA Network, and have CNBC on their systems, then they must also take and pay for this new network. And NBC will sell it to them for ten cents a month per subscriber. After all, most people wouldn't even notice a ten-cent increase in their cable bill. But if you do the math, if there's 85 million homes times twelve months a year, all of a sudden, it's 100 million dollars per year into the NBC coffers—even before they sell a commercial. Where's the market demand? There isn't one.

So I don't think there is a market for the edgier content. In my almost thirty years in Los Angeles—most of it spent in the

entertainment media—I never once heard someone say, “That was a good movie, but it would have been even better if there were more F-words or a more graphic sex scene.” Violence has always been part of our society, but I think there’s a false sense of marketplace demand.

QUESTION: If there is no market demand for more graphic content, why are the broadcasters mirroring that type of content on cable rather than copying the family-friendly content?

WINTER: Some of the edgier programs are well written, well directed, and well acted. That’s why they’re good. *The Shield* was one of the most violent shows of its day. Now, it’s not so much because the standards moved and other shows had to go beyond that baseline. But the show was well written and intensely acted and directed. Yet, the number one and two shows on television today are *American Idol* and *Dancing with the Stars*. Why is that? Do we want to see Simon Cowell having sex on top of the desk? No, of course not.

QUESTION: Are those two shows indicative to you that broadcasters do not have to have graphic content to have a hit?

WINTER: Yes, absolutely. A family audience doesn’t watch a show for skimpy outfits. The bottom line is that these shows are not over the top and not using gratuitous sexual content. Look at the box-office receipts. There’s a huge audience out there that is woefully underserved. Look at the Hallmark Network. It is perennially a top-ten or top-twenty cable network.

As for violence on television, there is a lot of material, especially on some of the crime dramas, where they are imitating what’s in the newspapers in terms of crime stories when there is horrific crime out there. I also believe that the saturation of media violence has created a more coarse and violent society. I think the media culture is having a big impact, and I don’t think we should ignore that.

QUESTION: How do you respond to those who say that kids even as young as elementary school are using profane language and talking about sex, so why should we be so worried about what’s on television in this regard?

WINTER: First, that would be saying that it’s OK that they’re using that kind of language. Second, where are they getting it? Are they getting it from Billy’s older brother Tommy? Perhaps. Are they hearing it in their homes? Perhaps, on some level.

We did a study here at the PTC about profanity not too long ago. The exponential growth in profanity on the public airwaves during prime time—especially the 8:00 to 9:00 p.m. family hour—is up a couple hundred percent over the last decade. The use of profanity is

not up a couple hundred percent in public in general. The instances of the word “bitch” on television versus the usage of that term in most families shows a massive disconnect between what we’re seeing as normal on television versus what happens in most families.

As far as harms coming from profanity, there is not as much research that demonstrates what the harms are. Some studies show the more profane a child is, the more of a bully he or she tends to be. That’s the “Achilles heel” in our legal arguments—that the demonstrated harm is not as great as in other forms of objectionable content.

QUESTION: In terms of programming, what do you record and who analyzes the video?

WINTER: We record the primetime broadcasts—8:00 to 11:00 p.m.—of all the broadcast networks and a large amount of original programming on basic cable. If it’s a repeat broadcast, sports, or news, we don’t do it. It’s just entertainment programming. We record primarily the east coast feeds of these shows.

If there is a special reason to do so, then we will record outside of primetime. For instance, we recorded the Olympics. We wanted to see how NBC was promoting some of its more graphic programs during non-primetime hours when families were watching. Are they airing really graphic promotions? We also wanted to see the Viagra and K-Y Jelly ads and so forth. We did the same thing for CBS’s coverage of the NCAA basketball tournament.

QUESTION: You mentioned looking at advertisements as part of your analysis. Can you tell us about PTC’s Advertiser Accountability Program?

WINTER: We look at advertisers of ostensibly family-brand products. For example, consider Kentucky Fried Chicken. In its ads, mom is bringing home a bucket of chicken for the kids and the kids are all happy eating their chicken legs. But why, then, are you sponsoring the threesome in the hot tub on MTV?

The notion is that we don’t want the advertiser to become comfortable sponsoring the gruesome murder on cable on A&E and then, a couple of years later, decide it’s OK to do it on over-the-air broadcast during primetime when there are a lot of kids in the audience.

We document and record television programming and we make available—free of charge through our website—a guide for parents to make better viewing choices for their families. Research and education are foundations for everything we do. When we think a law has been broken in terms of broadcast indecency, we tell our



members about it, file an official complaint, and urge our members to do likewise.

We also record every sponsor of every show. If you are a corporate sponsor and your product's brand image is that of a family-friendly product, but then you sponsor something that conflicts with that image, we think there's a disconnect. We talk to the advertiser. We have a relationship with a few hundred advertisers, with various levels of closeness and amicability. Some hate us and some love us. If they are sponsoring something that is graphic or extreme, we call them out on it.

QUESTION: When you say "call them out on it," what does that mean?

WINTER: Our Advertiser Accountability Program starts with direct outreach. That's a quiet, behind-the-scenes reaching out to the advertisers to let them know what they have done. Sometimes that's all we need to do. We get a letter or call back saying, "We didn't know we were on that show. It's against our policy. Thanks for the heads-up. We'll be more careful." And they are, and that's great.

Sometimes, however, that isn't enough. We'll get a letter back that says, "Go pound sand. We don't care." They'll do it more eloquently by saying, "We're not in the business of trying to regulate what someone should or should not see. We're just trying to find an audience." If we get back one of those letters, or if they simply don't reply to us, we'll monitor their behavior. Sometimes they come off the show and sometimes they don't. If they don't, we'll ratchet up the pressure and have our members write to them. We have a scorched-earth policy where we'll issue press releases and send letters to the newspapers. If that's not enough, then we'll buy shares of a company's stock, show up to a shareholders' meeting unannounced, and then read a script during the shareholders' open forum addressing the issue to the CEO.

Now they expect us because we've made quite a scene. The CEOs have gatekeepers—the marketing people—who try to keep us away. They don't want the CEO to know that they're getting complaints about their advertising, but they can't put up a blockade when we're looking the CEO in the eyes and reading a script about what they have sponsored. It's a very powerful confrontation—more than ninety percent of the time we either get an apology or the CEO wants to speak to the media buyer to find out what's going on.

Sometimes, even then, we'll get a shrug of the shoulders. If it's a publicly traded company, they have a publicly listed board of directors. More and more today, companies have an ethics specialist

on their boards. We get a hold of the corporate responsibility person and show them scenes from the offending shows.

QUESTION: If a sponsor was advertising on a particular show, and you had a problem with one particular episode of that show, would you still go after the sponsor?

WINTER: It depends. We have a couple of different guidelines. If a show normally isn't so bad, but this is a particularly bad episode, we'll talk to the advertiser. We do this because if the advertiser pushes back at the network—we have some great intelligence on this—it really does work. Scenes get edited out or edited down to be less graphic. I wish I could take my members a clip reel of what didn't make it on the air because of this, but I don't have that tape.

It could be one episode of a show that is particularly heinous. It also could be a show that is repeatedly heinous, graphic, or explicit—*Family Guy*, for instance. It's constantly in your face and edgy, and it's intentional. We'll wage a campaign against anyone who sponsors a show that's constantly like that.

We're very careful, however, not to say, "Don't sponsor the show." We say, "Don't associate yourself with the content that's so graphic." It's an important distinction.

Some advertisers routinely support graphic programming. There are some you would expect. Victoria's Secret, for instance, is not sponsoring *Extreme Makeover Home Edition*, but it sponsors *Nip/Tuck*. There are some advertisers that have a penchant for trying to push edgy content and endorsing it. So all of these situations require a different tactic on our part.

QUESTION: Can you share some examples of advertisers you've gone up against in these kinds of battles?

WINTER: In one instance, an auto manufacturer wasn't just sponsoring explicit, sexually violent programming on basic cable, but it also had product integration in the programming. Our outreach to that corporation went over like a fart in church. We could not make any inroads into the hierarchy of that company. We talked to our grassroots leaders—volunteers around the country who lead local chapters of the PTC—and told them we have this car manufacturer that's not only sponsoring this program but also integrating its product into the show. We told them that company officials are acting with disdain about our outreach to them. The grassroots leaders across the country went directly into the sales managers at the local dealerships for that auto manufacturer and told them they would normally be a customer but, because the company sponsors this show, they won't buy here. Then they give the sales managers a

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script from the program and an alert from the Parents Television Council.

The car company will ignore our calls, but when its dealers call and say, “I’m losing business because of what you idiots are doing in your media buying,” they’ll take that call. We’ve seen growing levels of success on that grassroots front.

QUESTION: That must be very rewarding for your organization. What are some of the frustrations you face?

WINTER: We see progress every day on different levels, but unfortunately, when you turn on the TV, there still is a lot of really bad stuff on at all times of the day. This, in turn, makes our members wonder whether we are making a difference. Of course, we’re making a difference. If they knew what my friends inside the networks are saying about what didn’t make it to air, then they would say, “Gosh, that was a really good check I sent you for fifty bucks last year. Here’s another fifty for this year.”

It’s frustrating not to be able to communicate some of the stuff we hear that demonstrates our effectiveness. Every once in a while, we have a big win, like when the U.S. Supreme Court in 2009 overturned the federal appellate court and said, “No, the FCC can regulate this.” Not only did we bring this case, we urged the FCC to appeal it. That case would not have been brought without our efforts. It would have stalled a number of times, but for our efforts. I’m really proud of that.

It’s frustrating when you have such well-funded opponents who not only have a blank check to write to fight us, but who also control the airwaves to get their message out.

QUESTION: Do you see the news divisions of the networks working in unison with the entertainment divisions, either in terms of getting a message out or squelching a particular message? Is it explicit?

WINTER: I think there is a preponderance of journalists—in all forms of journalism—that is predisposed to disagree with the founding principles of the PTC. A lot disagree for the same reason I initially disagreed, before I became a parent. I figured these are just a bunch of religious whiners trying to impose their standards on me. There is a tendency by those in the media not to be favorably inclined to our message without giving it any consideration.

They are also financially motivated to be that way because they get the same stock options as the folks in the programming department. Profit is profit, so that means their personal income goes up. A number of times I have seen instances in which the news

organization of a media conglomerate downplays a story when the other side of the conglomerate is the target. Control of the media is centered in a few entities and those few entities have economic interests that spread throughout the organization.

QUESTION: Are you saying the pressure is more subtle than explicit?

WINTER: It's subtle, but it's there. For instance, with the Janet Jackson incident during the Super Bowl half-time show, most Americans were shocked, upset, and thought there was a law against such a thing. There was a huge reaction to what happened. Most Americans don't know, however, that CBS is in federal court today defending what it did. If the American public realized that the networks are at war in court defending this type of thing, they would be outraged. On some level, FCC regulation affects every family in America because they will be watching TV at some point. Yet, this is not covered by the news media. That's a demonstration of the commitment by the media to make sure Americans are not aware of it.

QUESTION: Obviously these media organizations are well funded, but how much of your own job is devoted to raising money for the organization?

WINTER: With any non-profit organization, regardless of the issue, the CEO spends a big portion of time on fundraising, and that's true with me. A couple of years ago, a CEO of one of the major media companies was asked about the PTC, and he denounced us as a "well-funded opposition group." My budget for the organization was five million dollars. His personal salary that year was twenty-two million dollars.

The economic downturn has hurt almost all non-profits. The Bernard Madoff scandal put many of the Jewish organizations out of business. Some of the media advocacy groups are out of business. The National Institute on Media and the Family, based in Minneapolis, was a great organization. When times got really lean, however, one of the steps it took—I knew it was a death knell—was to accept money from the industry. When you take money from the industry over which you are a watchdog, it just doesn't work out. It went out of business, which was unfortunate.

Times are tough for us. We have gone from an approved staffing level of thirty-two people down to twenty in just two years. Revenues have gone from \$6.5 million to \$3.5 or \$4 million. Funding is tough, and it's especially difficult when I'm up against corporations with unlimited check-writing capacity.

A couple of years ago, I testified at a U.S. Senate hearing on media violence. The great First Amendment scholar from Harvard, Laurence Tribe, was hired by the industry to defend violence in the media. He wrapped himself in the flag, talked about how much we cherish First Amendment rights and had them eating out of his hand. After all, this is Larry Tribe! I can't afford to hire him. Rumor was he was paid one million dollars by the cable industry for that appearance.

Go back to our own numbers for a moment. We have 1.3 or 1.4 million members and less than one hundred thousand of them give any money to us over the course of a year. The average gift is about forty-five dollars. We get some foundational giving—usually to fund a particular project of ours. I did get a one hundred thousand dollar check from a billionaire, and one time I got a personal letter from an obviously very elderly person—judging from the handwriting—with a crumpled-up five-dollar bill. Talk about getting choked up over a five-dollar bill.

I am so fortunate to meet some incredible people when I go around the country and talk to our members and donors. Those moments are touching and inspiring, but the toughest part of any non-profit is the fundraising.

QUESTION: On the flipside, do you or the PTC ever get threats from people who do not like what you're doing?

WINTER: Yes, we get death threats. Sometimes we go to the authorities, depending on how credible and specific the threat is. We went to the authorities earlier this year, and the Los Angeles Police Department investigated what turned out to be a threat from someone who was emotionally ill and off his meds. It is disquieting when someone is threatening your life.

QUESTION: How do you respond to those critics that accuse you of trying to engage in censorship tactics?

WINTER: I hate to answer a question with another question, but here it's necessary. What is censorship? What levels of censorship are more readily acceptable to our society than others? The word censorship is a lightning rod, like racist or anti-Semitic. There simply is no positive way to describe yourself as a censor.

The reality is that pure free speech never has and does not now exist in this country or any other. There is no such thing as unbridled free speech. If you commit perjury, fraud, or libel, you pay the price. There are expressions of speech that are prohibited and we are OK with that in this country because of the harm involved. On the

spectrum between no harm and a lot of harm, where is broadcast indecency? We can argue this point until the cows come home.

The issue of time, place, and manner regulations applies here. As an organization, we are not saying, “You cannot broadcast such and such a thing,” but we are saying, “There’s a time and a place for it. On the public airwaves, there should be more restrictions than in other forms of media, including cable television.”

My goal, as head of this organization, is not to interfere with any adult’s right as to what he or she can lawfully consume. Rather, it is my goal to make sure that the harms to children that I believe exist are minimized, addressed, and made more of a priority for parents.

I don’t like government being involved in my life any more than anyone else does. When you have public airwaves, however, which require some rulemaking and you have an agency that must make sure the public interest is being served, then I guess there is some level of censorship taking place. It’s uncomfortable for me to say that because of the stigma that comes with that word. I realize it’s difficult, but that doesn’t mean you don’t do it. It means that you address it intelligently, in a way that hopefully preserves, protects, and defends the principles our nation is founded upon without wrapping, in the cloak of the flag, an argument that doesn’t deserve that protection.

QUESTION: How has the downturn in funding affected the work that the PTC does?

WINTER: With any organization, you think, “If only we had an extra X dollars, look what more we could do.” I yearn for that. When we look at the new forms of media that are potentially harmful—the Internet among them—we know we don’t have the resources to handle them. We don’t have enough resources here to cover what’s on TV, let alone other forms of media.

### **C. A Combustible Combination: Indecency, the FCC, and the PTC**

It seems that there is a constant, if not inevitable, stream of salacious television content flowing out of Hollywood studios about which the PTC can complain, loudly and clearly, to both the FCC and broadcasters. In 2009, for instance, it was on-air promos for a sexual threesome on the CW show *Gossip Girl* that prompted Winter to write to the network and pose the rhetorical question, “Will you now be complicit in establishing a precedent and expectation that

teenagers should engage in behaviors heretofore associated primarily with adult films?”<sup>77</sup>

Around the time of the interview with Winter, the object of the PTC’s wrath was the CBS network television series provocatively titled *\$#! My Dad Says*.<sup>78</sup> In a May 2010 press release, Winter stated:

CBS intentionally chose to insert an expletive into the actual name of a show, and, despite its claim that the word will be bleeped, it is just CBS’ latest demonstration of its contempt for families and the public. There are an infinite number of alternatives that CBS could have chosen but its desire to shock and offend is crystal clear in this decision.<sup>79</sup>

Almost predictably, the *Los Angeles Times* picked up on the story and Winter’s quote, giving the PTC the kind of mass media nourishment that it needs to succeed.<sup>80</sup> In this section, Winter discusses the regulation of broadcast indecency by the FCC and the PTC’s efforts in this area to have the FCC ramp up its enforcement of the federal law that gives it the power to punish broadcasters who transmit such content.

QUESTION: When the FCC enlarged its definition of profanity from religious blasphemy and divine imprecation to language that is so grossly offensive that it constitutes a nuisance to the person who hears it, was that a good thing because it now gives the Commission more authority to go after broadcasters for profanity as well as indecency?

WINTER: I think that distinction is one without much of a difference. What is indecency? What is profanity? I look at them as different shades of the same color.

Again, there are a lot of different standards in terms of language. I tend to be a time-of-day kind of guy in terms of my advocacy. The networks say, “That’s all hogwash. If we wanted to use the F-word after ten o’clock we could, but we don’t.” But then, CBS is launching

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77. Walt Belcher, *Threesome Has Group Hot Under the Collar*, TAMPA TRIB., Nov. 9, 2009, at 2.

78. Press Release, Parents Television Council, PTC Denounces CBS for New Show, “\$#! My Dad Says” (May 20, 2010), available at <http://www.parentstv.org/PTC/news/release/2010/0520b.asp>.

79. *Id.*

80. See Greg Braxton, *Quick Takes; Group Blasts CBS’ ‘\$#!’*, L.A. TIMES, May 21, 2010, at D3 (quoting Winter and reporting that “the Parents Television Council is not laughing at the title of one of CBS’s new comedies”).

a new show called “Shit My Dad Says,” but they’re bleeping out the S-word in the title.

There is so much hypocrisy. It’s the bottom line that drives these networks. If a guy uses the F-word at work around female employees and creates a hostile work environment, that guy is getting fired. But, at the same time, the networks want to have the right to put it into every living room in the country.

QUESTION: What do you think about the FCC’s current definition of indecency? Is it a workable standard?

WINTER: I’m OK with it. After all, any time you get lawyers involved with trying to define anything, it’s difficult. Whether you’re a broadcaster or a parent, you deserve some sense of understanding what the law means. One of the big problems that we’ve called out for years is the dearth of legal precedent of what is or is not indecent. If there were more precedent, we would have more certainty on the issue. What the FCC failed to do for decades is not really define it—that is, it failed to develop a body of law, like the common law, with all the distinctions and qualifications of what is and is not unlawful.

Twenty-five years ago we would not even be having this conversation about language in broadcasting. When I started at NBC in 1982, Grant Tinker was president of the network. I read his autobiography, and he talked about when he fired Howard Stern. The topic on Howard Stern’s radio show was how big of a tampon would the Statue of Liberty need. Tinker couldn’t believe WNBC radio was putting this on the air, saying “This isn’t what we stand for at NBC.” The guys in radio were saying, “Hey, this guy makes money for us. If we fire him, he’s going to go across the street to the other station and kill us in the ratings.” Tinker said, “Let him go across the street and kill us.”

Times change, but I think they are changing much more rapidly in broadcasting because of the lack of oversight by the FCC where it has authority—not addressing complaints as they came in, dismissing them as a bunch of whiners rather than recognizing there actually is a public interest issue that we should address.

QUESTION: What would you say the harm is from a so-called “fleeting expletive” on the airwaves?

WINTER: First, the term “fleeting” profanity is a brilliant device for our opponents. It’s just a fleeting “fuck” and then it’s gone. Profanity is fleeting by its very nature! It’s said and it’s gone.

The point is, if you’re sitting there watching TV and Bono drops the F-bomb on an awards show, is there harm from that one word? I think it has weakened a family value if the family value is that we



don't use that word. But it's the cumulative effect—Bono, then Cher, then Nicole Richie, and so on.

I guess it's like tobacco consumption. You have that one cigarette in high school, and it's not going to give you cancer. But if you keep going, it accretes over time and has an effect. By the way, that's what the research shows on the effect of sex and violence on a child. It's the impact on a child's brain. One of the best resources in terms of medical evidence is at the Indiana University School of Medicine—a website found at [sosparents.org](http://sosparents.org)—the Center for Successful Parenting. They did MRI imaging of a child's brain exposing it to video violence and so forth. They found there's a chemical reaction in a child's brain that's the same when a child is a victim of real violence or consuming media violence. That chemical reaction interferes with the cognitive brain development and it's cumulative. I think it's true with profanity as well. The more you hear profanity, the more ubiquitous it becomes. Children then feel that's what everyone says.

TV has the ability to normalize behavior. If children think, "We don't do this in my house because my parents say we can't," but then they see all these kids on TV doing the behavior, their belief is that that's how the broader society behaves and we're the odd balls.

QUESTION: To what do you attribute the stepped-up enforcement efforts by the FCC? Was it Michael Powell, Kevin Martin, Janet Jackson, or the Parents Television Council?

WINTER: I would say all of the above. Actually, not Michael Powell. He doesn't care much for either our organization or for broadcast indecency enforcement. In fact, he loathed it and was forced into it. He was forced to deal with it in part because of Janet Jackson, but even before that, he was forced into it by us and the pressure we put on Congress. Our grassroots members got behind this effort in a big way by communicating to their representatives and senators. There was pressure from the Hill on the FCC to enforce the indecency regulations.

Things had gotten out of hand, starting with Howard Stern twenty years or so ago. There was the occasional violation, fine, or ruling by the FCC on the radio, but until January 2004, not a single television show had ever been held as indecent. The first fine for broadcast indecency on television was for a station in San Francisco for a portrayal of "The Puppetry of the Penis."<sup>81</sup> Coincidentally, the fine

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81. See *In the Matter of Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (Jan. 27, 2004), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-04-)

came down a week before the Janet Jackson striptease took place. We were celebrating that the FCC finally ruled on television for the first time ever, and then we turned on the Super Bowl!

I think the broadcast indecency issue so annoyed Powell that he quit. He just said, “Screw this. I’m going to make some money somewhere.”

I admire Kevin Martin very much. He took indecency enforcement very seriously. Powell, on the other hand, said a number of times that he didn’t want to be anybody’s nanny. About a month before I started at the PTC, Brent Bozell met with Chairman Powell, along with some other pro-family groups, to discuss broadcast indecency and the lack of enforcement. Powell looked at Brent in the eye and said, “We don’t get any complaints.” Brent then took out a stack of papers, threw it on his desk, and said here are thousands of complaints that have been filed. Powell was taken aback by this. That’s all hearsay—I wasn’t there at the meeting—but that’s how it was described to me. Then, there were hearings.

There was such an increase in graphic, explicit sexual content, profanity, and violence on television—not covered by the indecency regulation—that it had crossed the tipping point. Parents were so fed up with it, but they felt there was nothing they could do. Most members of the American public don’t know it’s their responsibility to complain to the FCC. They think there must be a rule about not putting that stuff on the air and there must be someone whose job it is to look at it. There is, however, no wall of monitors at the FCC where people are looking for this sort of thing.

From Howard Stern to *NYPD Blue*, it was so in your face. Janet Jackson was the proverbial straw that broke the camel’s back. The Super Bowl was the single-most watched show of the year—it usually

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16A1.pdf. This case, which pivoted on a performance act aired on a San Francisco television station during a morning news show, involved performers who:

appeared on camera wearing capes and discussed their stage show, in which they appear nude in order to manipulate and stretch their genitalia to simulate a wide variety of “installations,” including objects, architecture, and people. During the course of the interview, one of the performers asked whether they could demonstrate, by stating “Should we show you a couple of quick ones?” One of the show’s two hosts agreed, if the demonstration was done “quickly.” As the performers stood and apparently turned away from the camera to demonstrate their act to the show’s hosts, the penis of one of the performers was fully exposed on-camera.

*Id.* at 2.

is—and it was a half-time performance. It was a sucker punch at the right place and at the right time, triggering the public's response and outrage, yet it was merely one symptom of a much bigger problem and it broke free the floodgates.

QUESTION: What action did the PTC take after the Janet Jackson incident?

WINTER: We have communications outreach to our members. We have almost 1.4 million members. They're actually records in our database and some of those records are Mr. and Mrs., so it's actually more than that. Of those, about 200,000 we communicate with by email. The rest we would have to mail to, but we don't have the money to mail a million people. So we sent out emails and some regular mail saying, "If you agree that the Janet Jackson incident violates the law, here's the form you can use to complain to the FCC."

What's interesting about the Janet Jackson incident is that, in February 2004, we were at the height of the second Persian Gulf War, yet the single biggest news story for about a month was Janet Jackson's breast—not what was going on with Saddam Hussein. It was a release of pent-up energy that was stored without any known outlet. We got about 150,000 new members in just a few weeks after the Super Bowl. Our organization could not exist without a market need. I think if we had a marketing budget to tell folks that we're here, we would have twenty million members.

QUESTION: Was the Janet Jackson episode a teachable moment, at least in terms of FCC enforcement of indecency?

WINTER: The teachable moment was an awareness about a bunch of things going on that nobody previously knew about. Most Americans—probably ninety-five percent or more—don't know that the TV networks are in federal court suing for the right to use the F-word at any time of the day.<sup>82</sup> If Americans knew that, they would be outraged. The networks understand that, so that's why they don't cover the story, publicize it or talk about it. But when the Janet Jackson incident happened, more people learned about the Bono incident. It helped to create a greater awareness of the issue and motivated some people to take action. There were about a half-million complaints, with less than half coming through the PTC.

QUESTION: Certainly, you've heard the criticism that most of the complaints to the FCC on this issue are generated by the PTC and

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82. See, e.g., *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010).

often by people who did not even see the television program. People go to your page and use the form to file the complaint. How do you respond to this?

WINTER: So what if they didn't see the show? It's their airwaves and it's the law. If you don't like the law, change it.

The statements that these complaints are somehow ginned up or not representative of a great swath of America simply is untrue. We don't file a complaint for anybody. People join this organization because they believe in what we're doing.

I joined the Sierra Club and the Nature Conservancy because I give a damn about the environment. As with any national policy or affinity group, you join a group because you are of that same mindset to agree with what they're doing.

People join the PTC because they are concerned about the amount of sex, violence, and profanity on TV—especially that being targeted to kids. The notion that we are responsible for ninety-something percent of complaints filed with the FCC is untrue. But I don't care if it's true or not.

I'm guessing that a large number of complaints about drilling in the Arctic National Wildlife Refuge come from Sierra Club members. I've never been to the Arctic National Wildlife Refuge, and I file my complaints through the Sierra Club, saying let's not drill there. People who champion gun laws probably get a lot of complaints from National Rifle Association members. That's why they join the NRA. Complaining about something our government or others are doing isn't necessitated by a personal experience of having been involved in that action—whether it's drilling, the war in Iraq or anything else.

The PTC was one of the first groups to create an online form to file a complaint with the FCC. I'm proud of that because we are providing a means for members of the public to speak out to the government and to seek a redress of grievances, as is protected by the First Amendment.

Ironically, there was a time when Howard Stern felt he was being taken advantage of, and he instructed his listeners to go to our website and file indecency complaints against Oprah Winfrey. Guess what? That wasn't a PTC thing, but if you looked at the complaints against Oprah, they came through the PTC server.

We provide an outlet that is important to have. Before we got involved with this—back in the Michael Powell days—the process of how to file an indecency complaint wasn't even clear. You needed a transcript; that seemed unreasonable. But we record everything, so we have the transcript.

If you believe that sex, violence, and profanity on the public airwaves is a problem and you join the PTC to help solve that problem, then whether or not you've witnessed something doesn't mean a violation of law hasn't occurred. In no other law enforcement area do you require someone to actually see a crime if there is other evidence of that crime.

Jeff Jarvis reported a few years ago that he did a Freedom of Information Act request to the FCC to find out where the complaints came from. The number that was reported—something like 99.8 percent—was wrong and inaccurate. The FCC can't keep track of the number of complaints we send them. They screw up the number all the time, by thousands or even hundreds of thousands. They'll look at their records and say, "We had x-number of complaints." Then we'll look at our records and say, "No, there were more than that just from us." Then, you add in the other groups that filed and you find that the numbers are not correct. My understanding of that FOIA request was that it turned into an e-mail answer in which some person at the FCC who did not have authentic data shrugged his shoulders and said, "The PTC is responsible for 99.8 percent." There was no data to back up that figure. It was a knee-jerk response from someone who didn't like us at the FCC.

QUESTION: Did you go back to the FCC with your data to counter its report?

WINTER: It was one of those things where the people who like us would say, "Yes. Go for it, PTC," whereas people who hate us would say, "You guys are filing all the complaints." It's like the old adage, "Don't stop to kick every barking dog." That was one where we thought that we had other things to do. But it was patently untrue.

To satisfy myself, I called the FCC and got the tally figure for the number of complaints that were filed over one of the years that was cited. Less than half actually came from us. I called some of the other family groups—American Family Association, Focus on the Family, Family Research Council, and American Decency Association—and asked them how many complaints they filed. They gave me the figures, and when I added all of these numbers to our own numbers, it still came out to only about eighty percent of the total complaints filed.

So, it's just not true. It reveals the hypocrisy—if you're going to debate me, do so on the merits and don't be a liar. Whoever gave that number at the FCC was a liar.

QUESTION: Do you have any sense of how the current FCC chair, Julius Genachowski,<sup>83</sup> will address the indecency issue?

WINTER: Mixed signals. When I say mixed, in reality, there had been no signals for months. Then, on June 3, 2010, we saw that the FCC issued a Notice of Apparent Liability on a station in Texas for the *American Dad* horse masturbation episode. The FCC had been moving to investigate our complaints by reaching out to the stations to find out whether the episode of *American Dad* aired as we described it and so forth. The Texas station apparently didn't feel like answering the FCC's questions, so the FCC fined it for not following through on the investigation. The FCC didn't fine the station for airing the horse masturbation scene. We have not had a broadcast indecency violation in four or five years. When we had those findings by the FCC, it wasn't a political battle. They were unanimous decisions. It doesn't fall on political lines. We have had Democrats who are very supportive and Republicans who have been unsupportive. This is not a "red" or "blue" issue. It's a purple issue.

So we don't have any concrete sense about how Genachowski will address the indecency issue. He testified at his confirmation hearing—he was asked specifically about indecency regulations—that he will enforce the law.<sup>84</sup> We know that he is abundantly familiar with this issue. Not only does he have kids, but he also was one of the founding board members of Common Sense Media,<sup>85</sup> which is based in San Francisco. We have great respect for Common Sense Media.

I think, like Michael Powell, Genachowski would prefer not to deal with this issue. It's not easy, but it is good, however, to see the

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83. *Biography of FCC Chairman Julius Genachowski*, FED. COMM'C'N COMM'N, available at <http://www.fcc.gov/commissioners/genachowski/biography.html> (last visited Mar. 7, 2011).

84. See John Eggerton, *Pols Grill FCC Nominee*, DAILY VARIETY, June 17, 2009. Eggerton observed that Genachowski:

sent a mixed message on the question of indecency—an issue on which the biz is looking for a respite from the aggressive enforcement approach taken by Martin's FCC. He said he would enforce indecency laws, citing the recent Supreme Court decision regarding "fleeting" expletives, but he also touted other options for helping parents screen out potentially objectionable content.

*Id.*

85. *Our Mission*, COMMON SENSE MEDIA, available at <http://www.common sense media.org/about-us/our-mission> (last visited Mar. 7, 2011) (describing its mission as "dedicated to improving the lives of kids and families by providing trustworthy information, education, and independent voice they need to thrive in a world of media and technology.").

current FCC taking some steps to look into the outstanding complaints—1.6 million complaints are now backlogged at the FCC, from what we’ve heard. We’ve also heard that the FCC was moving forward on these complaints just to give itself some cover—to show folks who agree with us that they’re doing something about it, as opposed to doing nothing. In other words, the FCC is doing this more for show.

#### **D. Violent Content: The Next Frontier for FCC Regulation?**

If there is one category of media content that is as controversial as either sex or indecency, it surely seems to be violence. For instance, in April 2007, the FCC issued a massive report on violent television content and its impact on children in which it concluded that “action should be taken to address violent programming”<sup>86</sup> and suggested that “[b]roadcasters could adopt a family hour at the beginning of prime time, during which they decline to air violent content.”<sup>87</sup> The FCC argued in the report that:

Congress could impose time channeling restrictions on excessively violent television programming in a constitutional manner. Just as the government has a compelling interest in protecting children from sexually explicit programming, a strong argument can be made . . . that the government also has a compelling interest in protecting children from violent programming and supporting parental supervision of minors’ viewing of violent programming. We also believe that, if properly defined, excessively violent programming, like indecent programming, occupies a relatively low position in the hierarchy of First Amendment values because it is of “slight social value as a step to truth.”<sup>88</sup>

But it is not just television portrayals of violence that are in the legal crosshairs today. In April 2010, the United States Supreme Court granted a petition for a writ of certiorari in *Schwarzenegger v. Entertainment Merchants Association*<sup>89</sup> to consider whether the First Amendment bars a state from restricting the sale of violent video

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86. In the Matter of Violent Television Programming and its Impact on Children, 22 FCC Rcd. 7929, 7931 (Apr. 25, 2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-50A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-50A1.pdf) (last visited Mar. 7, 2011).

87. *Id.* at 7949.

88. *Id.* at 7940.

89. 130 S. Ct. 2398 (2010), 176 L. Ed. 2d 784 (2010).

games to minors and whether a state must demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors.<sup>90</sup> The Ninth Circuit had earlier declared unconstitutional the California law at the center of the case.<sup>91</sup>

The Court heard oral argument in *Schwarzenegger* on November 2, 2010,<sup>92</sup> in the face of a wall of precedent developed by lower federal courts across the country—a wall built steadily and unanimously during the past decade—that is stacked tall and sturdy against the constitutionality of similar laws restricting and limiting minors’ access to violent video games. Starting in 2001 and moving through the present, such laws have been enjoined by several federal appellate courts in addition to the Ninth Circuit.<sup>93</sup> No federal appellate court has ever upheld such a law. In addition, laws limiting minors’ access to violent video games repeatedly have been enjoined by federal district courts.<sup>94</sup>

During oral argument, Justice Antonin Scalia seemed particularly concerned about First Amendment interests, querying Zackery Morazzini, the attorney representing California, “What’s next after violence? Drinking? Smoking?”<sup>95</sup> Adam Liptak of *The New York Times* described Scalia as “the law’s most vocal opponent”<sup>96</sup> during

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90. Questions Presented, *Schwarzenegger v. Entm’t Merch. Ass’n*, No. 08-1448, available at <http://www.supremecourt.gov/qp/08-01448qp.pdf> (last visited Nov. 9, 2010).

91. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

92. See Transcript of Oral Argument, *Schwarzenegger v. Entm’t Merchants Ass’n*, No. 08-1448 (Nov. 2, 2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1448.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf).

93. See *Entm’t Software Ass’n v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (affirming a permanent injunction against a Minnesota violent video game statute); *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954 (8th Cir. 2003) (issuing a permanent injunction, on First Amendment grounds, stopping St. Louis Cnty., Mo. from enforcing a regulation limiting minors’ access to violent video games); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (enjoining an Indianapolis, Ind., statute affecting minors’ access to violent video games in arcades).

94. See *Entm’t Merch. Ass’n v. Henry*, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. Sept. 17, 2007) (issuing a permanent injunction against Oklahoma’s law); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (enjoining a Louisiana law affecting minors’ access to violent video games); *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1052 (E.D. Ill. 2005), *aff’d on other grounds*, 469 F.3d 641 (7th Cir. 2006); *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (enjoining a Washington state law limiting minors’ access to certain violent video games).

95. See Jess Bravin, *Justices Split on Violent Games*, WALL ST. J., Nov. 3, 2010, at B4 (providing an overview of the oral argument and quoting Justice Scalia).

96. Adam Liptak, *Law Blocking Sale of Violent Video Games to Minors is Debated*, N.Y. TIMES, Nov. 3, 2010, at A16.



oral argument. For instance, Liptak noted that Scalia asked Morazzini, “What’s a deviant violent video game? As opposed to what? A normal violent video game?”<sup>97</sup>

*USA Today’s* Supreme Court reporter, Joan Biskupic, wrote that the justices “showed the greatest skepticism for the argument that government should be able to keep minors from violent video games.”<sup>98</sup> She observed a seeming alliance on the side of the First Amendment interests among Justices Scalia, Ruth Bader Ginsburg, and Anthony Kennedy.<sup>99</sup>

On the other hand, as the *Washington Post* reported, Justice Samuel A. Alito Jr. “seemed sympathetic to California.”<sup>100</sup> The *Post’s* story added that “three justices—Chief Justice John G. Roberts Jr., Stephen G. Breyer and Alito—seemed particularly disturbed by the games and the argument that states have no power to keep them from juveniles.”<sup>101</sup>

In this section, Tim Winter discusses his feelings on the regulation of violent media content on television and in video games.

QUESTION: Should Congress give the FCC the authority to regulate violence on television, as was suggested in an FCC report a few years ago?

WINTER: If you follow the genesis of that report, you’ll see that members of Congress wrote a letter to the FCC saying there’s graphic violence on television and asking whether the FCC has the authority to regulate violent content. Nothing happened, however, for more than a year until the Parents Television Council, in January 2007, issued a report on violence during primetime on broadcast TV. The numbers were shocking in terms of the increases and, qualitatively, in terms of just how much more gross and graphic the violent scenes were. We did a press conference at the National Press Club in Washington, D.C. and invited FCC Commissioner Michael Copps, American Psychological Association representative Jeff McIntyre and Dr. Zanga from North Carolina. We were talking about the impact of media violence on children and Commissioner Copps mentioned this letter to the FCC that no one had acted on. He said he hoped this report would be a catalyst to move that forward.

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97. *Id.*

98. Joan Biskupic, *Justices Take Up Ban on Violent Games*, USA TODAY, Nov. 3, 2010, at 3A.

99. *Id.*

100. Robert Barnes, *Proposed Ban Puts Justices in ‘Mortal Kombat’ Ring*, WASH. POST, Nov. 3, 2010, at A1.

101. *Id.*

I think we were a catalyst because our report and the press conference generated media coverage, including what Copps had said. All of a sudden, there was renewed interest in media violence. Senator Jay Rockefeller announced a hearing. That's when the FCC took notice and issued its report.

I don't know if media violence should be regulated like indecency. When I look at the evidence of harm to kids—depictions of violence versus sex versus profanity—I think the greatest harm comes from violence. I would like to see the industry be more responsible so we didn't need to have the conversation, but it seems unable or unwilling to do so.

QUESTION: What type of harms do you see?

WINTER: According to the research we've read, violent media causes children to become more aggressive and more violent. It desensitizes them to real violence and real victims of violence in terms of lack of empathy. Children tend to live in unreasonable fear of their own circumstances because of what they've seen and what they think is more real than it actually is. That affects their behavior. Children believe that violence is an acceptable resolution to conflict.

Our opponents like to say that the amount of youth-on-youth violence is down over the years even though television consumption is up so there cannot be a relationship. In a vacuum, they would be right, but we're not in a vacuum. We have a number of intervention efforts today—police activity and education activity. When I was at NBC, the network launched its "The More You Know" campaign, costing them a lot of airtime, but it did it because it knew, as a broadcast medium, it could influence people's behavior. From the stuff that we've seen out there, the evidence only points in one direction, and it is causation. It's not as if you watch one episode of *Tom and Jerry* and then take a hammer to another kid's head. It is cumulative over time, and it's not going to affect everyone equally. It's the gratuitous and graphic nature of the violence that is having an impact. It used to be one cowboy shot another cowboy, who then fell off his horse and died. Now the bullet enters, the bullet exits, body parts fly, and it's all in slow motion. It's the gore factor.

The report we issued last October showed that, over a five-year period of time, violence generally on television had gone up only about two percent, but violence involving female victims went up 120 percent. What's more, where the victim was a female teenager, the violence had gone up an astounding 400 percent. It's almost like there's this torture-porn theme out there that deserves some attention. Why do the networks need to show women as victims of

sexual violence? I would hope that the programmers could tone it down a bit.

If the industry doesn't do better, then the government is going to have to do something about it because the stakes are too high if it doesn't.

QUESTION: The PTC is taking an active interest in video game violence as well. Why is that?

WINTER: There was a bill<sup>102</sup> in the California legislature several years ago introduced by an assemblyman at the time who is now a state senator, Leland Yee.<sup>103</sup> The issue came to us indirectly from one of our grassroots chapter directors who works for the police near Ann Arbor, Michigan. There was a similar bill in Michigan.<sup>104</sup> It did not prohibit either the sale of violent video games or the marketing, distribution or playing of the games. All it did was prohibit an unaccompanied minor from buying an ultra-violent video game.

The video game rating system actually is the most accurate of the different forms of media ratings. They tend to be the most accurate ratings. M-rated and AO-rated games are not supposed to be purchased by a child under the age of seventeen and eighteen, respectively.<sup>105</sup> That's the industry's policy.

But talk about a conflict of interest. The retailer is sitting there and the kid has money to hand to the retailer to buy something. Does the retailer not take that money? Sadly, a large number of times, a child is able to buy a game that he or she shouldn't.

The Michigan bill was dying in the state house because of the pressure put on the lawmakers by the video game industry. It's the video game industry's own rule, but they wanted to make sure there was no law behind it.<sup>106</sup> We got involved, the grassroots chapters got

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102. A.B. 1179, 2005–06 Reg. Sess. (Cal. 2005).

103. Sen. Leland Yee, Ph.D., CAL. STATE S., <http://dist08.casen.govoffice.com> (last visited Nov. 9, 2010).

104. S. 249, 93d Leg., 1st Reg. Sess. (Mich. 2005).

105. See Board Game Ratings & Descriptor Guide, Entertainment Software Rating Board, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited Nov. 9, 2010) (noting that “[t]itles rated M (Mature) have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language” and “[t]itles rated AO (Adults Only) have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.”).

106. For an in-depth discussion of the video game industry's position on this type of legislation, see Clay Calvert & Robert D. Richards, *Free Speech & The Entertainment Software Association: An Inside Look at the Censorship Assault on the Video Game Industry*, 32 J. LEGIS. 22 (2005) (including an interview with then-ESA president Douglas Lowenstein).

involved, the bill passed and was signed into law by Gov. Jennifer Granholm. We were present at the bill-signing ceremony.

In Illinois, it was the same thing—Governor Rod Blagojevich was signing the bill with our chapter director behind him. Again, the bill was dead, we got our grassroots chapters involved and it passed. The same thing happened in California. In each case, the video game industry filed a lawsuit saying that's an unreasonable interference with a child's First Amendment right to play a violent video game. Hogwash. We're not opposed to an adult buying the game. The parent can buy the game for the kid. We're not saying a child cannot play the game or that a company cannot make the game or market it. Just limit the sale of it.

The grassroots chapters in California wrote to their legislators and the bill was signed by Governor Arnold Schwarzenegger. We weren't sure he was going to sign it because he made a lot of money from violent movies. The industry filed suit, and we lost and urged the governor to appeal it. We lost at the Ninth Circuit.<sup>107</sup> We urged California Attorney General Jerry Brown to appeal it to the U.S. Supreme Court. State Senator Yee, who holds a Ph.D. in child psychology, was so appreciative of the PTC's efforts to get this bill passed that he actually flew down from San Francisco to address our grassroots conference a couple of years ago. He joked that his staff thought he was nuts because he was on a plane to Los Angeles and not a single person at the conference could vote for him. He told us the reason is that the bill would not have passed without the PTC's support.

QUESTION: Were you shocked that the Supreme Court took the case?

WINTER: No, not at all. This is a classic example of a state's authority to regulate something it thinks is harmful to a child. It passes muster in terms of the constitutional issues—it's specific enough, explicit enough, and understandable enough. It is as clear to me as any pornography rule. I think we're going to win this one.

QUESTION: Will the Parents Television Council file an *amicus* brief?

WINTER: Oh yes. Again, you have to go back to the hypocrisy of our opponents. The industry's rule, if enforced, takes money out of their pockets so they don't want to enforce the rule. I will tell you, on the record, I don't know if we're going to win the fleeting profanities

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107. See *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

case and I don't know if we are going to win on Janet Jackson, but I do think we're going to win the video game case.

If a broadcast decency case is going to be considered by the Supreme Court, and the constitutionality of broadcast decency is on the line, I would rather have it be the *NYPD Blue* case. The Janet Jackson case and the profanity case remind me of the old adage "bad cases make bad law." I fear all of broadcast indecency enforcement relying on those two cases.

#### IV. Analysis & Conclusion

During the first decade of the 2000s, the PTC rose to public prominence and power on a wave of indecency complaints filed by its members that caught the FCC's attention and coincided with that agency's ratcheted-up approach to regulating the public airwaves. But now, as the comments of Tim Winter subtly suggest, perhaps the PTC is at a bit of a crossroads. The economy has taken its toll on the PTC's fundraising and budget in recent years. That, in turn, has caused it to dramatically reduce the number of full-time PTC employees. Winter himself even seems to keep a somewhat lower media profile than his predecessor, Brent Bozell. In addition, Winter's discussion about targeting violent video games indicates there might be some mission creep—in other words, a gradual expansion of its goals over time—for an organization with the word "television" in its title. Indeed, Richard Huff of the *Daily News* in New York contended in 2009 that "it's getting harder for the Parents Television Council to remain relevant,"<sup>108</sup> deriding it as a "publicity-hungry watchdog group."<sup>109</sup>

For now, however, the PTC seems to be doing a lot—and quite well—with the dwindling financial resources and support staff that it possesses. As Winter suggested, the broadcasters and entertainment industry have much more fiscal firepower on their side, but the PTC continues to pressure advertisers. For instance, in May 2010, the director of its Louisville, Ky., chapter attended the annual shareholders meeting of Yum! Brands—owner of fast-food chains KFC, Taco Bell, Pizza Hut, and Long John Silver's—and made the following statement:

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108. Richard Huff, *This Watchdog Is Barking Up The Wrong Tree*, DAILY NEWS (N.Y.), Feb. 27, 2009, at 91.

109. *Id.*

As a shareholder I am concerned because Yum! Brands consistently advertises on programming that contains graphic violence, excessive sexual content and foul language and we think this needs to stop—now. Chairman Novak, the PTC has been here before with little to no response from Yum! Surely, you understand how Yum!’s irresponsibility in the media marketplace can undermine the good name of your family brands. KFC, Taco Bell, Pizza Hut and Long John Silver’s are family-friendly chains. It is a shame that that their parent, Yum! Brands, does not demonstrate leadership as a responsible corporate citizen. The company’s consistent pattern of advertising shows that it supports some of the most violent and vulgar programming on television.<sup>110</sup>

It is just one example of a perfectly legal—and sometimes effective—strategy the PTC employs to get the results it desires. The shareholder tactic certainly seems to embrace the politics-of-shame strategy called for by former PTC President Brent Bozell and noted earlier in this article.<sup>111</sup>

During the course of the interview, Winter makes clear the fundamental premise that underlies all of his efforts at the Parents Television Council—the media do more than merely reflect reality, they influence and shape it. As he put it, “I believe entertainment media are one of the most powerful forces in human history. That’s not hyperbole; I really mean it.”<sup>112</sup> His fears about how shows such as *The Fifth Wheel* might influence his daughter’s beliefs and actions about how girls should act to gain the attention of men led him to the PTC.

Winter clearly seems to enjoy positioning the PTC as David battling the Goliath that is the Hollywood entertainment industry. A key point he made here, however, is that beyond the disparity in terms of monetary resources, there is a certain amount of self-censorship that transpires when the news side of a media conglomerate serves the entertainment side of the corporate house. As Winter stated, “A number of times I have seen instances in which

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110. Press Release, Parents Television Council, PTC Calls on Yum! Brands to Reconsider Sponsorship of Graphic TV Shows (May 20, 2010), *available at* <http://www.parentstv.org/PTC/news/release/2010/0520.asp>.

111. See *Producers Not Heeding Criticisms*, *supra* note 61 and accompanying text.

112. See *supra* Part II.A.

the news organization of a media conglomerate downplays a story when the other side of the conglomerate is the target.”<sup>113</sup>

Viewed from the outside, some may get the sense that the PTC is fighting a quixotic battle against a culture that it perceives as becoming more coarse and crude by the day. But for Winter, as this article has made clear, the PTC sees its battles against the broadcast industry as anything but mere folly. As Winter puts it:

It’s a two-fold issue: Either you do or do not believe that entertainment has the power to do harm. I think those who don’t believe it have kind of a the-world-is-flat vision. If you believe there is a potential for harm—especially to kids—then the question becomes, “What do you do about it?” Do you simply say it’s the parents’ responsibility or do you say—if I can borrow from Hillary Clinton—it takes a village? It takes more than just parents.<sup>114</sup>

Today, the battle is growing even more difficult for the Parents Television Council. Significantly, the Second Circuit’s decision in *Fox Television Stations, Inc.* disarmed the FCC, at least in three states, of its major enforcement weapon—the longstanding indecency regulations. The PTC now must pin its hopes on either a successful appeal to the Supreme Court or upon a rehearing before the Second Circuit, the latter of which the FCC petitioned for in late August 2010.<sup>115</sup>

In an email exchange with one of authors of this article after the Second Circuit’s opinion was released in July 2010,<sup>116</sup> Tim Winter candidly explained his feelings about the opinion. They are set forth below, unedited as they appeared in his email to one of the authors.

WINTER: I am truly disappointed that the Second Circuit ruled as it did in the so-called “fleeting profanity” case. But I am not at all surprised with the ruling. When watching the oral arguments on C-

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113. See *supra* Part III.B.

114. See *supra* Part III.A.

115. See Joe Flint, *Company Town; FCC Appeals Rejection of Its Indecency Rules*, L.A. TIMES, Aug. 27, 2010, at B3 (describing the FCC’s decision to petition for a rehearing); *FCC Appeals on Indecency; Says Indecency Ruling Will Tie Its Hands*, DAILY VARIETY, Aug. 27, 2010, at News 4 (describing the FCC’s decision to petition the Second Circuit for a rehearing *en banc*).

116. E-mail from Tim Winter, President, Parents Television Council, to Clay Calvert, Professor & Brechner Eminent Scholar in Mass Comm’n, University of Florida (July 28, 2010, 15:22 EST) (on file with author).

SPAN several months ago, the judges' hostility to the notion of the FCC's indecency policy was abundantly apparent. In fact the conduct of the judges was downright contemptuous. Regardless of a court's ultimate decision, I don't understand how our legal system could condone such a verbal assault on one party during oral arguments. It certainly contradicts the insistence of U.S. Senators at the confirmation hearings of Supreme Court nominees, whereby they ask if the nominee will keep an open mind when reviewing the cases brought before him/her. How many times have we heard that this summer during the Kagan hearings?

I am hearing from reliable sources at the FCC that there will be an appeal to the Supreme Court, and I am substantially certain that *cert* will be granted. But I do not hold out much confidence in winning at the SCOTUS level. Last year's ruling was 5-4 and Justice Thomas seems inclined not to support the Constitutional argument. I believe the only way we would prevail is if the FCC can successfully demonstrate to the Court the continued validity of the scarcity spectrum argument, which is the foundation for virtually ALL of the federal government's regulatory oversight of broadcast spectrum—even beyond matters of decency. Some of our opponents in this case actually have much to lose if the spectrum scarcity rationale is undermined, e.g., media ownership restrictions. The FCC also needs to establish that radio has no "less restrictive means" as a solution, and therefore the Court would be creating two standards for the broadcast medium.

I continue to be nauseated by the hypocrisy of the industry that I love so much. They have been profoundly dishonest in the past several years when they speak about broadcast decency. First they said that they have no intention or desire to be indecent. Then, they said that they would gladly follow the indecency laws, if only they could understand precisely what they meant. Then, they said it was up to a parent to use the technology tools available to block offensive content, even though they made no mention whatsoever that the technology tools would not have blocked the content at issue in these cases. They have wrapped themselves in the flag so that they are freed from any obligation to prevent the harshest of profanity at any time of the day. Their PR spin has been superb, as they have deftly crafted the issue away from what it is: airing harsh profanity in front of children. They already have the legal ability to air such material after 10 p.m., and a responsible steward of the public's airwaves should be more than satisfied with that.



The broadcasters demand to be treated on a level playing field with cable, yet they continue to exploit the legal advantages afforded them by must-carry and other regulations designed to help broadcasters to serve the public interest. And at no point in the entire equation have the broadcasters stepped up to the plate and offered to help define standards for broadcast decency when children are likely to be in the audience.

Such conduct is contemptible. But that's what corporations do when they are determined to step on anyone or anything that prevents them from generating cash, even if it means being exploitive.<sup>117</sup>

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117. *Id.*